United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1065

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P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL DOUGLAS MacARTHUR, SR. VILLAGE, INC., STATE OF NEW YORK, COUNTY OF NASSAU, VILLAGE OF HEMPSTEAD, TOWN OF HEMPSTEAD, SCHOOL DISTRICT NO. 1, SADIE SCHWARTZ, D.C.R. HOLDING CORP., HENRIETTA RAND, MARTHA BARKUS and SHIRLEY HERSHKOWITZ,

Defendants.

D.C.R. HOLDING CORP., HENRIETTA RAND, MARTHA BARKUS and SHIRLEY HERSHKOWITZ, SADIE SCHWARTZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE
VILLAGE OF HEMPSTEAD

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL DOUGLAS MacARTHUR, SR. VILLAGE, INC., STATE OF NEW YORK, COUNTY OF NASSAU, VILLAGE OF HEMPSTEAD, TOWN OF HEMPSTEAD, SCHOOL DISTRICT NO. 1, SADIE SCHWARTZ, D. C. R. HOLDING CORP., HENRIETTA RAND, MARTHA BARKUS and SHIRLEY HERSHKOWITZ,

Defendants.

D. C. R. HOLDING CORP., HENRIETTA RAND, MARTHA BARKUS and SHIRLEY HERSHKOWITZ, SADIE SCHWARTZ,

Defendants-Appellants.

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BRIEF OF DEFENDANT-APPELLEE VILLAGE OF HEMPSTEAD

STATEMENT OF THE CASE

General Douglas MacArthur Senior Village, Inc. hereinafter referred to as "MacArthur" is a membership corporation which was chartered pursuant to the Laws of the State of New York, on January 25, 1965 to provide housing for elderly families and persons on a non-profit basis.

On or about April 28, 1966, the United States, acting through the Secretary of Housing and Urban Development, loaned the sum of $1,774,000 to MacArthur. The United States received a note in that sum secured by a first mortgage which, together with a regulatory agreement, was recorded in the Office of the Clerk of the County of Nassau on May 9, 1966.

After completion of the senior village facility, MacArthur failed to pay the County real estate taxes for the years 1969 and 1970 and School District and Village taxes for the 1968/69 and 1969/70 fiscal years which were assessed against it.

D.C.R. Holding Corp. purchased the Village tax lien from the Village of Hempstead for $20,288.11, and Sadie Schwartz acquired the County and School District liens for $25,305.19. The Estate of David Rand owns the 1969/70 School District and Village liens and the 1970 County lien, totaling $79,198.47.

On August 4, 1971, a proceeding was commenced pursuant to Title 28 U.S.C. §1345 to foreclose the United States' first mortgage on the ground that MacArthur had violated those provisions of the note and mortgage requiring it to pay all local real estate taxes levied against the property as the same became due. The holders of unpaid real estate tax liens or tax sales certificates were joined in this proceeding as defendants, and the United States urged that its lien was superior to those of the purchasers of the tax liens.

The answers filed by the municipalities and tax lien purchasers

disputed the United States' claim that its mortgage was entitled to priority over the local real estate tax liens. Sadie Schwartz and D. C. R. Holding Corp. cross-claimed against the municipalities for recovery of the sums they paid for tax sale certificates if the United States' mortgage were accorded priority.

The United States moved for summary judgment. The motion was granted by District Judge Jack B. Weinstein who found, however, that the local real estate tax liens were superior to the government's mortgage.

The Court of Appeals unanimously reversed that determination of the District Court with respect to the priority to be given local real estate tax liens, holding that the application of the Federal Tax Lien Act of 1966 should be limited to Federal tax liens and should not be extended to the somewhat analogous field of Federal mortgages. The Court of Appeals also found that there was nothing in Chapter 13 of Title 12 U. S. C. evidencing Congressional intent to waive sovereign immunity to permit the local real estate tax liens to have priority over the Federal mortgage.

This Court remanded for consideration the cross-claims of Sadie Schwartz and D. C. R. Holding Corp.

The Supreme Court denied certiorari.

The municipalities then moved for summary judgment dismissing the cross-claims. There were no issues of fact raised - the only questions before the Court were questions of law.

The motion was granted by District Judge Jack B. Weinstein, who held that the cross-claimants in purchasing their tax liens did so with forewarning of the United States mortgage which was a matter of public record. Under these circumstances the cross-claimants could not prevail.

The cross-claimants appeal from the final judgment in favor of the County, Town, Village and School District against the cross-claimants.

QUESTIONS PRESENTED

Where claimants purchased tax lien certificates of the Village of Hempstead while fully aware of a prior recorded federal mortgage, may they obtain a refund of the purchase price from the Village if the federal mortgage is subsequently adjudicated to have priority over the tax certificates to the proceeds of sale upon a foreclosure of the federal mortgage?

The District Court answered this question in the negative.

Did the Village of Hempstead have power to tax the MacArthur property notwithstanding the federal mortgage imposed upon it?

The District Court answered this question in the affirmative.

Where there is no claim of fraud or duress exerted by the Village against claimants, and no warranties or representations were made by the Village other than those contained in the Real Property Tax Law, did the claimants purchase their tax certificates at their

own risk?

The District Court answered this question in the affirmative.

POINT I

THE VILLAGE OF HEMPSTEAD PROPERLY ASSESSED THE SUBJECT PROPERTY FOR VILLAGE TAXES - THE SUBJECT PREMISES WERE NOT IMMUNE FROM TAXATION BY REASON OF THE MORTGAGE HELD BY THE UNITED STATES.

The purchaser of a tax sale certificate does not obtain an ultimate title that is free and clear of all liens or claims prior to the levying of the tax for which the certificate has been issued.

The purchaser of a tax sale certificate takes whatever interest the Village may have to convey subject to certain claims of record.

Thus, a tax title is subject to the lien of a United States deposit fund mortgage, PEOPLE v. PIERCE, 186 Misc 485, 64 NYS2d 251; a claim by the state industrial commission for unpaid unemployment contributions, RIVERHEAD ESTATES CIVIC ASSOC. v. GABRON, 206 Misc. 405, 134 NYS2d 13; grade crossing elimination obligations, LYFORD v. NEW YORK, 140 F2d 840, CERT. DEN. 323 U.S. 714, 89 L Ed 574; easement rights acquired by grant prior to the levying of the tax under which the sale took place, BEEMAN v. PAWELEK, 96 NYS2d 204, aff'd 276 AD 1057, 96 NYS2d 312; REAL PROPERTY TAX LAW, SECTION 1464, subd. 3.

Even in the absence of specific statutory language, the sale of a tax sale certificate is subject to superior liens of sovereignties. RIVERHEAD ESTATES CIVIC ASSOCIATION v. GABRON, 206 Misc. 405, 134 NYS2d 13; CF. HANNAH v. BABYLON HOLDING CORP., 28 NY2d 89, 320 NYS2d 25.

The Village, however, in issuing its certificate of sale to the purchaser clothes such purchaser with "presumptive evidence that the sale and all proceedings prior thereto, including the assessment of the land and the levying of the tax were regular and according to the provisions of this section and of all laws relating thereto." REAL PROPERTY TAX LAW, SECTION 1454, subd. 2. This section, it is to be noted, deals with presumptive evidence as to the title which a tax sale certificate purchaser receives and in no way relates to priorities. (See also: NASSAU COUNTY ADMINISTRATIVE CODE, SECTION 5-54.0)

The basis for a refund to the purchaser of his monies paid for a tax sale certificate sold by the Village is contained in SECTION 1464, subd. 6 of the REAL PROPERTY TAX LAW which provides as follows:

> "In the event that any grantee under such conveyance is unable to obtain possession of the real property conveyed to him by reason of any error or irregularity in the assessment thereof, in the levying of a tax, or in any proceedings for the collection of any tax, the board of trustees shall refund to the purchaser the money so paid with interest, the same to be audited and paid as other village charges."

(See also: NASSAU COUNTY ADMINISTRATIVE CODE - SECTION 5-68.0)

Absence the claim of fraud or coercion by the Village, the sole basis for a refund must be found in statutory authority.

Liability for refund of the amount paid by the purchaser of property at a tax sale, where title fails or the property is exempt from taxation, does not exist at common law, and therefore is purely statutory. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, THIRD EDITION (Revised), Vol. 16, Sec. 44. 172, Page 527.

As the New York Court of Appeals noted in PHELPS v. MAYOR, ETC., OF NEW YORK, 112 NY at 222:

> "If the tax or assessment is patently illegal and its payment is coerced, an action on the equity side of the court to have it declared void and the moneys paid returned would be a proper form of remedy; but lacking the element of coercion, the form of duress of person or property, payment must be held to be voluntary."

Thus, repayment of the monies paid by claimants to the Village must be predicated upon one of the following grounds:

a. An error or irregularity in assessment.

b. An error or irregularity in the levying of the tax.

c. An error or irregularity in any proceeding for the collection of any tax.

It is submitted that none of the above grounds are present in the instant case.

Neither the assessment nor levy of the tax upon the subject property was erroneous or irregular. Although this real property was

burdened with a mortgage held by the United States as mortgagee at the time of the sale of the tax certificates to claimants, this circumstance did not render the real property immune from assessment and levy by the Village of Hempstead.

The sole ground upon which plaintiff sought foreclosure of its mortgage was the fact that local taxes had not been paid. 337 F. Supp. 955. This Court upheld the validity of the local tax, but refused to grant a priority to the local property tax liens over the mortgage lien of the United States. The validity of the local tax lien was not disturbed. UNITED STATES v. GENERAL DOUGLAS MacARTHUR SENIOR VILLAGE, 470 F2d 675, Cert. Denied, Sub Nom., COUNTY OF NASSAU ET AL v. UNITED STATES, 412 U.S. 922. SEE: HANCE ET UX v. CITY OF NEW BRUNSWICK, _____N. J._____, 146 A 673.

This Court in upholding the validity of the Village property tax commented as follows:

> "...At least since McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat) 316 (1819), property of the United States has been immune from taxation by the states or their subdivisions, in the absence of Congressional consent. Of course, in the case at hand, the United States does not own the property, but has only a mortgage interest. Although in such a case local governments may assess taxes based on the full value of the property, see S.R.A., INC. v. MINNESOTA, 327 U.S. 558 (1946), NEW BRUNSWICK v. UNITED STATES, 276 U.S. 547 (1928), taught that local governments cannot take any action to collect unpaid taxes assessed against property which would have the effect of reducing or destroying the value of a federally held purchase-money mortgage lien. ACCORD,

S.R.A. INC. v. MINNESOTA, supra; UNITED STATES v. ROESSLING, 280 F.2d 933 (5th Cir. 1960). In short, the land is not immune from local taxation, but the federal interest is, and the local governments cannot enforce their liens until the federal debt is satisfied." (Emphasis added) 470 F.2d at 680.

The issue as to the validity of the Village property tax has been conclusively determined by this Court. This issue may not be relitigated upon this appeal.

POINT II

THE PURCHASERS OF THE VILLAGE TAX SALE CERTIFICATES BOUGHT THEM WITH FULL KNOWLEDGE OF THE RECORDED MORTGAGE HELD BY THE UNITED STATES ON THE SUBJECT PREMISES; THEY HAVE NO BASIS FOR A CLAIM AGAINST THE VILLAGE.

Claimants contend that they have purchased a tax certificate that cannot be ultimately converted into a deed to the subject premises. The answer to this assertion is obvious: claimants purchased their tax certificates with their eyes wide open.

Long prior to the sale of these certificates, the United States mortgage was a matter of public record. (Mortgage recorded in Nassau County Clerk's Office on May 9, 1966). Claimants in purchasing their tax certificates must be charged with the knowledge of federal and state law pertaining to the priority and effect to be given to the government's mortgage.

No representations or warranties were made by the Village in respect to the status or priority of the government's mortgage or of any matters pertaining to the sale other than those specifically imposed by statute.

It is no secret that tax sale certificates are purchased for speculation. This is not to imply that speculation is either improper or undesirable. It does, however, connote a sophisticated purchaser in matters relating to real estate ventures.

Claimants in purchasing their tax sale certificates took a calculated risk as to their ability to have such certificates ripen into a deed within the statutory period of time. Their purchase was a voluntary act on their behalf. The fact that they may have misunderstood or failed to comprehend the status and effect of the federal mortgage is no fault of the Village.

Certainly claimants would not have complained had the mortgager satisfied the government's mortgage ($1,774,000) and had claimants ultimately obtained a deed to the subject premises for their tax sale certificates. It was a gamble and claimants lost.

Claimants purchased the tax liens against this real property with knowledge of all of the facts and their purchase of these tax sale certificates must be held to have been a voluntary payment by them to one they did not owe any obligation. Thus, the sums paid by them cannot be recovered. McCUE v. BOARD OF SUPERVISORS, 45 AD 406, 61 NYS 315, aff'd 162 NY 235 (payment of tax on property assessed to

payor by mistake as payor fully knew); COMMERCIAL BANK OF ROCHESTER, 42 BARB 488 (payment of tax on portion of bank's capital invested in United States bonds which bank knew to be exempt from taxation); REDMOND v. NEW YORK, 125 NY 632 (assessment paid with knowledge of facts rendering it invalid); TRIPLER v. NEW YORK, 125 NY 721 (assessment paid with knowledge of facts rendering it invalid); ST. STANISLAUS CHURCH SOC. v. ERIE COUNTY, 153 Misc. 511, 275 NYS 84 (sewer assessment paid with knowledge that plaintiff was exempt therefrom).

Claimants were strangers to this real property. They were willing to gamble upon a tremendous windfall in their favor if the winds of chance had blown in their direction. That fate dealt unkindly with them, is not the fault of the Village.

As the District Court cogently observed:

> "In this action, claimants were in a better position than most lienholders. They had ample forewarning of the risks inherent in their transaction because the United States mortgage was a matter of public record at the time of purchase. The volume of case law holding federal claims superior to municipal claims should have alerted them to possible dangers. But, as businessmen, the claimants went ahead and sought the profit that is often the reward for bearing risks. Under the law of the market place, they must take the loss that is often the price for assuming risks." (83)

POINT III

CLAIMANTS ARE NOT ENTITLED TO A REFUND OF THE MONIES PAID FOR THEIR TAX CERTIFICATES BY REASON OF THEIR INTERPRETATION OF THE REAL PROPERTY TAX LAW OR A THEORY OF FRUSTRATION OF CONTRACT.

Defendant D.C.R. argues that it is entitled to a refund of the monies paid for its tax certificate on two theories:

First: Because the Village cannot deliver a conveyance or possession of the MacArthur property (Sec. 1464 RPTL) and Second: The doctrine of frustration.

D.C.R. would have this Court read into 1464 RPTL a provision that if the purchaser of the tax certificate cannot obtain a conveyance or possession of the real property purchased at a tax sale by reason of a superior right in the United States to the real property, and which claim of the United States was a matter of public record at the time of the sale of such tax certificate, then the purchaser may obtain a refund of his purchase price.

No such result is sanctioned by statute nor does D.C.R. cite any authority of any Court for this proposition. The sole basis for a refund is contained in Section 1464, subd. 6, RPTL and the facts of this case do not come within the parameters of this section.

The proposition advanced by D.C.R. is, furthermore, contrary to holdings by state courts that the sale of a tax certificate is subject

to superior liens of sovereignties. RIVERHEAD ESTATES CIVIC ASSOCIATION v. GABRON, 206 Misc. 405, 134 NYS2d 13; CF. HANNAH v. BABYLON HOLDING CORP., 28 NY2d 89, 320 NYS2d 25.

D.C.R. further contends that it is entitled to a refund of the monies paid by it for its tax certificate upon a theory of frustration of contract. In support of this theory, D.C.R. relies upon W.K. EWING CO. v. N.Y. STATE TEACHERS RETIREMENT SYSTEM, 14 A.D.2d 113, 218 NYS2d 253, aff'd. 11 N.Y.2d 749.

In EWING the Court held that implicit in a contract whereby plaintiff was to service a mortgage held by another on property constructed upon realty owned by the United States was an agreement that if the servicing obligation were assumed by a public authority the contract would terminate.

This case has absolutely nothing to do with the doctrine of frustration of contract, but rather with those cases dealing with the principle that non-performance is excused where without the fault of the promissor performance becomes impossible by the cessation of the existence of a necessary thing or person. (See: NY Jur, Contracts Section 370 - cessation of condition or subject matter not direct object of Contract).

The Court in EWING commented "...it is a fair evaluation of the intention of the parties and by necessary implication, that it was to be at an end in the event of the happening of such a contingency as this..." (Emphasis supplied) 218 NYS2d at 255.

It cannot be said that a fair evaluation of the intention of the parties upon the sale of the tax certificate indicates that by reason of the Federal mortgage on the MacArthur property that D. C. R. was to obtain a refund of its monies in the event that said mortgage was foreclosed and the property purchased by the United States.

Nor can such an intention be read by necessary complication.

The purchase by D. C. R. of the tax sale certificate was with knowledge of the Federal mortgage. The only basis for a refund is statutory and is contained in Section 1464, subd. 6, RPTL.

It would be an ultra vires act for the Village to have consented to a refund of this certificate for any reason other than specifically mandated by statute.

The inability of the Village to deliver a deed or possession of the property to the claimants was not by reason of the cessation of the existence of the MacArthur property, but rather due to the superior claim to said property by the United States. This claim was a matter of public record and the tax certificates purchased by the claimants were made subject to the claim of the United States. Under these circumstances, the doctrine of frustration of contract is wholly inapplicable.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

SAUL HOROWITZ
Corporation Counsel
Village of Hempstead

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Robert La Grassa, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-70 60' Rd Maspeth, N.Y.

That on the 26 day of April 1974 deponent served the within Brief of Defendant-Appellee Village of Hempstead upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose by depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

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Robert La Grassa

Sworn to before me this 26 day of April 1974

Michael De Santis

MICHAEL DeSANTIS
Notary Public, State of New York
[illegible]
Qualified in [illegible] County
Commission Expires March 30, 1973 75